





## Nguyen (Migration) [2022] AATA 1625 (4 May 2022)

### DECISION RECORD

|                                   |                                                                                                     |
|-----------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                        |
| <b>APPLICANT:</b>                 | Ms Nguyet Thi Nguyen                                                                                |
| <b>CASE NUMBER:</b>               | 1909053                                                                                             |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2015/3307245                                                                                     |
| <b>MEMBER:</b>                    | P. Maishman                                                                                         |
| <b>DATE:</b>                      | 4 May 2022                                                                                          |
| <b>PLACE OF DECISION:</b>         | Perth                                                                                               |
| <b>DECISION:</b>                  | The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa. |

Statement made on 04 May 2022 at 4:23pm

### CATCHWORDS

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship until the relationship ceased – family violence allegations – divorce – sponsorship discontinued – applicant returned to the sponsor’s home after divorce – no joint financial responsibilities – independent expert opinions – decision under review affirmed*

### LEGISLATION

*Migration Act 1958, ss 5, 65, 359*  
*Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.09, 1.15, 1.21-1.25*

### CASES

*He v MIBP [2017] FCAFC 206*

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 10 November 2015 on the basis of her relationship with Karel Willem Groeneweg (the sponsor). At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not meet cl 820.221(1)(a) because the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsor until the relationship ceased.
4. The applicant appeared before the Tribunal on 12 April 2021, 19 October 2021 and by video link on 4 May 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Karel Willem Groeneweg, the sponsor in person on 12 April 2021.
5. The Tribunal hearings were conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

8. The Tribunal had before it a copy of the Department's file.
9. The Tribunal received a copy of the delegate's decision record with the application for review. The delegate listed the documents received from the applicant. Copies of those documents are on the Department's file.

### **Background**

10. The applicant and sponsor met in 2013 and married on 27 September 2015. The sponsor notified the Department on 16 January 2017 he was separated from the applicant. The sponsor said the applicant continued living at his address due to financial concerns and the applicant's limited English.
11. The Department invited the applicant to comment on the information that her relationship with the sponsor had ceased. The applicant responded by email on 28 August 2017 that her relationship with the sponsor continued, that her sponsor was having a relationship with another woman, and that she had suffered family violence.
12. The applicant provided a statutory declaration to the Department on 6 February 2018 declaring her relationship with the sponsor ended on 17 August 2017 and she suffered family

violence perpetrated by the sponsor. The applicant provided evidence of family violence in the form of medical reports from Dr Michael Bediako and Dr Dang Sang to support her claim of family violence.

13. The applicant gave the Tribunal a copy of the divorce order terminating her marriage to the sponsor on 13 December 2018.

### **Evidence at hearing**

14. At hearing the applicant told the Tribunal her relationship with the sponsor had recommenced when she moved back in with him in February 2021. The Tribunal was concerned the applicant had made no mention of this significant fact prior to the hearing. The applicant said she and the sponsor ate together and slept together. The applicant said she no longer has a joint bank account with the sponsor. She does not know if she is recorded on the sponsors Centrelink records. She paid him \$100 because that was the amount she paid for the premises in which she lived prior to returning to the sponsor's house in February 2021.
15. The Tribunal suggested to the applicant it would be appropriate that the sponsor appear before the Tribunal to give oral evidence. The applicant explained the sponsor had brought her to the Tribunal and was waiting to take her home. The applicant contacted the sponsor by telephone and asked him to attend the hearing.
16. The sponsor gave oral evidence in person to the Tribunal. The sponsor said the applicant was put out of her previous premises and had nowhere to go and he offered for the applicant to stay in the spare bedroom in his house. She pays him \$100 per week rent and buys her own food. They do not have a joint bank account. Although her stay was conditional on her sleeping in the spare bedroom, she refuses to do so and sleeps in his bed with him. She sleeps in his bed only because she won't go to the spare room. The relationship between him and the applicant is a friendship only. The relationship is not a spouse or de facto relationship. The sponsor will not include the applicant on his Centrelink records because she is not his spouse or de facto partner. They are divorced and the sponsor received \$25,000 in property settlement.
17. The sponsor agreed with the Tribunal that he prepared the email on the Department's file dated 26 July 2018. The sponsor confirmed the detail he provided in that email was correct. The sponsor confirmed the applicant said to him she was keeping a photo of who she says is the sponsor and his sister-in-law as evidence in for a divorce. The sponsor confirmed the applicant asked him to delay their separation until she gets an Australian visa. The sponsor believes that the applicant's relationship with him was genuine and does not know if the marriage was just a scam to get an Australian visa.
18. The applicant's oral evidence of the current relationship was at odds with the sponsor's oral evidence. The applicant's claim to have resumed her partner relationship with the sponsor is inconsistent with her statutory declaration, in which she claims to be the victim of violence perpetrated by the sponsor. The applicant first claimed to have resumed her relationship with the sponsor at the hearing. The applicant did not provide any documents or, initially, call the sponsor to give evidence to support her claim to have resumed her relationship.
19. The applicant's oral evidence about the current financial and social aspects of the relationship and the nature of the household and their commitment to each other was vague and unconvincing. In contrast the sponsor's oral evidence was clear, direct and unrehearsed.

20. The Tribunal is not satisfied the applicant is a credible witness. The evidence that she resumed her relationship with the sponsor was given at the latest opportunity to put her case in favour of her application.
21. The Tribunal prefers the sponsor's evidence to the applicant's evidence.

### **Adverse Information**

22. The Tribunal adopted the procedure contained in s.359AA of the Act to put to the applicant information contained in the sponsor's email of 26 July 2018, confirmed by the sponsor in his oral evidence. The Tribunal told the applicant the information would be the reason or part of the reason for affirming the decision under review. The Tribunal explained that the sponsor's evidence was relevant to the review because it indicated the applicant's relationship with the sponsor had not resumed and she was not in a spouse or de facto relationship with the sponsor. If the Tribunal relied on the information, without comment or response from the applicant, the Tribunal could find she ceased to meet the requirement of cl.820.211(2), which requires her to be the spouse or de facto partner of the sponsor. This information maybe the reason, or a part of the reason, for the Tribunal to affirm the decision under review. The Tribunal invited the applicant to comment or respond to the information and advised the applicant that he may seek additional time to comment or respond. The applicant did not seek additional time to comment on or respond to the information.
23. The applicant told the Tribunal the sponsor was lying and that their relationship resumed in February 2021 and continues. The applicant denied she married the sponsor only in order to obtain an Australian visa. The applicant claims she kept a photo of the applicant and his sister-in-law as evidence, but never asked the sponsor to hold off on a divorce until was granted a visa.
24. The Tribunal does not accept the applicant's explanation that the sponsor is lying about the resumption and continuance of their relationship. The resumption of the relationship would require the mutual acknowledgment of the parties about the status of their relationship. The sponsor is unequivocal that he did not resume a spouse or de facto relationship with the applicant, but that he simply assisted the applicant by providing shelter when she had nowhere else to go.
25. The issue in the present case is whether the applicant is the spouse or de facto partner of the sponsor at the time of this decision, or alternatively if she meets the exceptions to that requirement.

### **Whether the parties are in a spouse or de facto relationship**

26. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to have been the spouse of the sponsor at the time of application. At the time of this decision the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

### **WAS THE APPLICANT THE SPOUSE, AS DEFINED, OF THE SPONSOR AT THE TIME OF APPLICATION?**

27. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all

others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d).

28. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

### **Were the parties validly married?**

29. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Department's file contains a copy of a Marriage Certificate issued by the Registrar of Births, Deaths and Marriages in Western Australia certifying the applicant and sponsor married in September 2015. There is no evidence before the Tribunal to suggest the marriage was not valid. On the evidence, the parties were, at the time of application, married to each other under a marriage that was valid for the purposes of the Act as required by s.5F(2)(a).

### **Are the other requirements for a spouse relationship met?**

30. The Tribunal considered the documentary evidence on the Department's file relevant to the nature of the applicant's relationship at the time of application.
31. The visa applicant gave the Department a signed written letter dated 24 August 2015. She details the commencement and development of her relationship with the sponsor, their travel together and social engagements they participated in and that they wanted to get married.
32. The sponsor gave the Department a signed written letter dated 21 October 2015 outlining his relationship with the applicant. The sponsor described how he met the applicant in May 2013; that he had travelled to Vietnam eight times to meet her, her father, sons and grandchildren in Vietnam from June 2013. He described the visa applicant had travelled to Perth four times to stay with him. He described that he and the applicant had been apart for three months in the 2½ years they had known each other. The sponsor described they communicated in writing using Google translate and made a few phone calls because of the language difficulty. The sponsor described the travel and social events they had undertaken together, and that in July 2015 they decided to marry and married on 27 September 2015.
33. The Department's file contains various photographs depicting the couple together and in various social situations with their respective families and friends between 2013 and February 2017. The photos include records of their holidays together and their wedding day surrounded by friends and family.
34. Records obtained from the Department of Human Services (Centrelink) indicate the applicant and sponsor were declared to be partnered to each other from 27 September 2015 until 23 January 2017.
35. The applicant gave oral evidence the sponsor looked after her financially and paid for everything when they were married. They opened a joint bank account at Beyond Bank in October 2015. She started working in mid-2016 receiving small amounts of cash that she gave to the sponsor to deposit into their Beyond Bank account. The applicant said the sponsor owned the house in which they live, and all the bills were in his name. They shared a bedroom in the house and shared the cooking. The applicant went fishing with the sponsor and she would go here and there with him. The sponsor drove her to her appointments. She

was happy in the marriage until a few months after their marriage when she felt hurt because she saw the sponsor kiss his sister-in-law on the lips.

36. The sponsor gave oral evidence confirming what he wrote in his email of 26 July 2018 happened. The sponsor confirmed he finished his relationship with the applicant in January 2017 and allowed her to stay in his house until she found somewhere else to live. The applicant found alternative accommodation in August 2017. The sponsor said with the benefit of hindsight he thinks the marriage was not a scam at the beginning, and that their relationship was genuine.
37. The Tribunal has considered the evidence as it applies to the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3).
38. On the basis of the evidence, the Tribunal finds the applicant and sponsor had a mutual commitment to a shared life as a married couple to the exclusion of all others, their relationship was genuine and continuing, and they lived together at the time of application, as required by s.5F(2)(b) – (d).
39. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made.
40. Therefore the applicant meets cl 820.211(2)(a).
41. The applicant's marriage to the sponsor ceased from 13 December 2018 by divorce evidenced by the divorce order made on 12 November 2018.
42. The Tribunal finds the applicant and sponsor are not validly married as required by s.5F(2) (a) of the Act, from 13 December 2018.
43. The Tribunal finds, on the basis of that evidence, the applicant is not the spouse, as defined, of the sponsor at the time of this decision.
44. The applicant claimed at hearing to have resumed her relationship with the sponsor when she moved back into his address in February 2021.

**IS THE APPLICANT THE DE FACTO PARTNER, AS DEFINED, OF THE SPONSOR AT THE TIME OF THIS DECISION?**

45. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
46. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
47. The Tribunal considered the evidence in relation to the matters r.1.09A(3).



48. The applicant's oral evidence about the current financial and social aspects of the relationship and the nature of the household and their commitment to each other was vague and unconvincing. In contrast the sponsor's oral evidence was clear, direct and unrehearsed.
49. The Tribunal prefers the sponsor's evidence to the applicant's evidence where the applicant's evidence is unsupported by any independent evidence.
50. The Tribunal considered the financial aspects of the applicant and sponsor's relationship.
51. The parties gave consistent evidence that they do not have joint ownership of assets or joint liabilities. They no longer hold a joint bank account. The Tribunal accepts the sponsor's evidence the applicant's payment of \$100 per week is in the form of rent, rather than has suggested by the applicant a pooling of financial resources. The Tribunal accepts the sponsor's evidence they buy their food individually.
52. The Tribunal finds the parties do not have joint ownership of assets or joint liabilities, or any legal obligations owed to each other. The parties do not pool their financial resources or share day-to-day household expenses.
53. The financial aspects of the relationship between the applicant and sponsor do not indicate they are in a de facto relationship.
54. The Tribunal considered the nature of the applicant and sponsors household.
55. The applicant claimed her relationship with the sponsor resumed in February 2021. She moved back into his house and back into his bedroom. She eats with the sponsor. The sponsor drives her to her appointments and helps her with paperwork.
56. The sponsor said they each buy their own food. He assists her with her paperwork because her English is not good. They share a bedroom, but only because the applicant won't go to the spare room. The sponsor said he let the applicant move back into his house only as a friend. He cares for her welfare because she has come to a foreign country, has only a basic command of English, and needs his assistance as a friend.
57. The living arrangements and sharing of housework of the applicant and sponsor are consistent with two people sharing accommodation. The applicant does not claim to have joint responsibility with the sponsor for the care of children. The nature of the applicant and sponsors household does not indicate they are in a de facto relationship.
58. The Tribunal considered the social aspects of the applicant and sponsors relationship.
59. Notwithstanding the applicant's claim to have resumed the relationship with the sponsor, the sponsor is unambiguous the relationship has not resumed.
60. The applicant claimed to go to the restaurant together and to have gone to a birthday party with the sponsor a few weeks ago. The applicant said she has not visited the applicant's brother and sister-in-law since resuming their relationship although they live close by.
61. There is no supporting evidence before the Tribunal that the applicant and sponsor represent themselves to other people as being in a de facto relationship. There is no evidence from friends, family or acquaintances that indicates any opinion about the nature of the applicant and sponsors relationship.

62. The social aspects of the applicant and sponsors relationship are not indicative of parties in a de facto relationship with each other.
63. The Tribunal considered the nature of the applicant sponsors commitment to each other.
64. The applicant maintains she is in a relationship with the sponsor and they are committed to one another. The sponsor says he is not in a partner relationship with the applicant but is concerned for her welfare. The sponsor says she is a hard worker, built her own home and bought land in Vietnam by herself. The sponsor considers the applicant should be granted a visa because she is a good worker.
65. The Tribunal acknowledges the sponsors concern for the applicant. The Tribunal acknowledges the applicant and sponsor are companions and friends. The applicant's claim to have reconciled with the sponsor is countered by her claims that she suffered family violence perpetrated by the sponsor, in conjunction with her divorce, and is inconsistent with the sponsor's oral evidence.
66. The nature of the applicant and sponsors commitment to each other is indicative of people who are friends, and not indicative of people in a de facto relationship.
67. Having considered the matters in r.1.09A(3) the Tribunal finds the applicant and sponsor do not have a mutual commitment to a shared life to the exclusion of others, they do not have a genuine and continuing de facto relationship with each other, and they do not live together in a de facto relationship.
68. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5CB(2) are met at the time of this decision. Therefore the applicant does not meet cl.820.221(1)(a).
69. The applicant does not claim that the sponsor has died. The sponsoring partner gave evidence in person at the hearing.
70. The Tribunal finds the sponsor has not died. Therefore the applicant does not meet cl.820.221(2).
71. At hearing the applicant claimed her relationship with the sponsor had resumed and was continuing. Notwithstanding her claim, the applicant maintained she had suffered family violence.
72. In the present case the applicant is seeking to establish family violence on the basis of a non-judicially determined claim of family violence.
73. The issue that arises on the evidence in this case is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.
74. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence, or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in r.1.21. These regulations, as relevant to this decision, are extracted in the attachment to this decision. The Tribunal notes that the violence, or part of the violence must have occurred during the relationship: r.1.23(3), (5), (7), (12), (14).

### **Has a claim of family violence been made under the regulations?**

75. Under r.1.23, a visa application is taken to include a non-judicially determined claim of family violence where either a joint undertaking to a court has been made by the alleged victim and alleged perpetrator or evidence in accordance with r.1.24 is provided.
76. The applicant in this case is seeking to rely on evidence referred to in r.1.24 – namely, a statutory declaration under r.1.25 and evidence of a type and number specified by the Minister for these purposes (see IMMI 12/116).
77. A statutory declaration under r.1.25 must be made by the spouse or partner of the alleged perpetrator. If the alleged victim is the spouse or partner, the statutory declaration must set out the allegation of family violence, name the person alleged to have committed the relevant family violence and if the *conduct* was not directed at the spouse or partner, name the person to whom it is directed and their relationship with the deponent: r.1.25(2). There are different requirements if the family violence is alleged to have occurred to another person: r.1.25(3).
78. The applicant made a statutory declaration on 6 February 2018 claiming her relationship with the sponsor ended on 17 August 2017 and that she had suffered family violence perpetrated by the sponsor. The applicant provided a medical report from Dr Michael Bediako, general practitioner, dated 5 September 2017 identifying she was suffering anxiety symptoms following marital conflict and difficulty getting on with her husband. The applicant provided a statutory declaration from Dang Sang, registered psychologist, dated 2 February 2018 expressing his opinion the applicant suffered family violence, especially emotional abuse, perpetrated by the sponsor. The Tribunal is satisfied these documents meet the evidentiary requirements in IMMI 12/116.
79. Therefore, the evidence presented meets the requirements of r.1.24. As such, a non-judicially determined claim of family violence has been made under r.1.23.

### **Has the applicant suffered family violence?**

80. The applicant told the Tribunal the sponsor started to be violent five to six months after they married when she observed him kiss his sister-in-law. The applicant said she was fearful because the sponsor threatened to send her back to Vietnam. The applicant said she loved the sponsor and did not want to leave him. The applicant claimed to have resumed a relationship with the sponsor in February 2021.
81. The Tribunal had regard to the applicant's statutory declaration, supporting evidence alleging she had suffered violence during her relationship with the sponsor and her oral evidence that her relationship had resumed and was not satisfied she had suffered relevant family violence.
82. Having considered all of the evidence before it, the Tribunal was not satisfied for the purposes of r.1.23 that the applicant has suffered relevant family violence. In accordance with that regulation, the Tribunal sought the opinion of an independent expert. On 31 August 2021 the independent expert provided an opinion that the applicant had not suffered relevant family violence. The applicant was provided a copy and invited to comment on the report. On 16 September 2021 the applicant responded that the independent expert was racist and dishonest, and requested a further hearing.
83. At hearing on 19 October 2021 the applicant was unable to give an example of racism displayed by the independent expert. The applicant said the independent expert had exaggerated the applicant's actions and minimised the sponsors actions in the relationship.

The applicant claimed the independent expert did not address coercive control exercised over the applicant by the sponsor. The Tribunal allowed time for the applicant to make a written submission in support of her claims.

84. The Tribunal sought a new opinion from the independent expert based on the applicant's claims. On 20 March 2022 the independent expert provided an opinion that the applicant had not suffered relevant family violence. The applicant was provided a copy and invited to comment on the report. On 7 April 2022 the applicant responded that her internet traffic is being monitored and requested a further hearing. The Tribunal also received a typed letter dated 5 April 2022.
85. At hearing on 4 May 2022 the applicant reiterated that the independent expert was unfair. The applicant is of the view the independent expert's interview was in the form of an interrogation and she was forced to address matters of a personal and sexual nature that she was not comfortable with. The applicant agreed the interviews with the independent expert were assisted by an interpreter.
86. The Tribunal acknowledges the applicant felt the interview with the independent expert was confronting. Unfortunately this is the nature of claims involving very personal issues such as those that surround claims of family violence. The Tribunal accepts the applicant does not agree with the independent expert's opinion but does not consider the applicant had been treated unfairly.
87. The Tribunal does not accept the independent experts report is affected by racism or the independent expert's personal feelings towards the applicant. The Tribunal is satisfied the report of the independent expert addresses all the claims of relevant family violence made by the applicant. The Tribunal is satisfied the independent expert addressed all adverse information with the applicant.
88. The Tribunal is satisfied that the opinion is authorised by the Regulations, in that it is provided by an independent expert who is a person suitably qualified to make the assessment, is an employee of an organisation specified for this purpose, and was properly made. Under r.1.23 the Tribunal is required to take as correct an independent expert's opinion, properly made.
89. Accordingly, the Tribunal finds that the applicant is not taken to have suffered family violence committed by the sponsor for r.1.22.
90. Given the above conclusion that the claim of family violence has not been established, the applicant does not meet the requirements of cl 820.221(3) for the grant of the visa. There is no evidence before the Tribunal that the applicant meets any of the alternative sub criteria. As the applicant does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.

## **DECISION**

91. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

P. Maishman  
Member

## ATTACHMENT - Extracts from Migration Regulations 1994

### 1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

### 1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

*Note 1* See regulation 2.03A for the prescribed criteria applicable to de facto partners.

*Note 2* The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or

- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

## 1.21 Interpretation

In this Division:

***independent expert*** means a person who:

- (a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and
- (b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

***non-judicially determined claim of family violence*** has the meaning given by subregulations 1.23(8) and (9).

***relevant family violence*** means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

***statutory declaration*** means a statutory declaration under the *Statutory Declarations Act 1959*.

**violence** includes a threat of violence.

...

### **1.23 When is a person taken to have suffered or committed family violence?**

- (1) For these Regulations, this regulation explains when:
    - (a) a person (the alleged victim) is taken to have suffered family violence; and
    - (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.
- Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

#### *Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975*

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

#### *Circumstances in which family violence is suffered and committed — court order*

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
  - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
  - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

#### *Circumstances in which family violence is suffered and committed — conviction*

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
  - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
  - (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

#### *Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence*

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
  - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
  - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
  - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and

- (b) the alleged victim is:
    - (i) a spouse or de facto partner of the alleged perpetrator; or
    - (ii) a dependent child of:
      - (A) the alleged perpetrator; or
      - (B) the spouse or de facto partner of the alleged perpetrator; or
      - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
    - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
  - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
    - (i) the alleged victim has suffered relevant family violence; and
    - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
- (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
  - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
  - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
    - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
    - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
  - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
  - (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.